IN THE COURT OF APPEALS OF IOWA

No. 3-1222 / 13-0777
Filed January 23, 2014

AMY M. LABS,
Petitioner-Appellee,

vs.

JAY A. KARTEUS,
Respondent-Appellant.

Appeal from the Iowa District Court for Linn County, Robert E. Sosalla, Judge.

Respondent appeals a final order of protection issued pursuant to Iowa Code chapter 236 (2013). **REVERSED.**

Michael McDonough of Simmons Perrine Moyer Bergman, P.L.C., Cedar Rapids, for appellant.

Daniel Nathanson of Nazette, Marner, Nathanson & Shea, L.L.P., Cedar Rapids, for appellee.

Considered by Vogel, P.J., and Mullins and McDonald, JJ.

McDONALD, J.

Jay Karteus appeals a final domestic abuse protective order issued pursuant to Iowa Code chapter 236 (2013), which prohibits him from having contact with his former spouse Amy Labs. On appeal, Karteus challenges the sufficiency of the evidence supporting a finding of domestic abuse assault. We reverse the judgment of the district court.

I.

Labs sought an order of protection on March 4, 2013, following an incident between her and Karteus occurring outside her residence. A preliminary order of protection was issued, and the matter came on for hearing on March 6, 2013. At the hearing on the final order, Karteus and Labs each testified. One of their daughters also testified, stating that Karteus has a history of physical violence against her and her siblings as well as against Labs. At the hearing, the district court took judicial notice of the parties' dissolution of marriage proceeding. During the hearing, the district court stated that there was a finding in the decree of domestic abuse and "[t]here is nothing that's changed that finding." The decree, however, did not contain a finding of "domestic abuse." It states only that Karteus had been "excessively physical" with Labs during the course of the marriage.

The evidence showed that on occasion Karteus ignores the parties' dissolution decree governing Karteus's visitation with the parties' youngest child. Instead of contacting Labs to arrange visitation, Karteus directly calls and/or texts the child in contravention of the decree and Labs' requests that he cease putting

the child in the middle of their visitation disputes. On the date in question, Karteus arrived at Labs' residence unannounced on a non-visitation day to take the child to a birthday dinner. Karteus parked his truck in front of the house, and Labs approached the truck to speak with him. The parties began speaking to each other through the open truck window. While still seated in the truck, Karteus raised his voice, started calling Labs names, and started waving his arms. When Labs insisted he leave, Karteus said, "I can be on this public road. In fact, I'm going to circle your house until my son grows balls enough to walk out and then I'm taking him." Labs testified that Karteus's conduct placed her in fear.

The incident in front of the house follows another incident occurring at the youngest child's school. On that occasion, Karteus, again on a non-visitation day, decided that he was going to pick up the child after basketball practice and take him to celebrate Karteus's birthday. After Labs learned of Karteus's plan, she went to the school to pick up Jon. Because she was concerned that Karteus would take the child for a birthday dinner without her permission, the basketball coach walked Labs and the child to Labs' vehicle. Labs and the school administrator saw Karteus parked next to the school with his vehicle running and his lights dimmed. When Labs left the school with the child, Karteus followed her for several blocks.

II.

Our standard of review of the district court's order depends on the mode of trial in district court. We review a civil domestic abuse proceeding tried in equity de novo. *See Knight v. Knight*, 525 N.W.2d 841, 843 (Iowa 1994). Where the

district court rules on objections as they are made, the case is tried as a law action, and our review is at law. *See Bacon ex rel Bacon v. Bacon*, 567 N.W.2d 414, 417 (Iowa 1997). In this case, the district court ruled on sustained objections to certain testimony and sustained objections to the admission of three of Karteus's proposed exhibits. The testimony and exhibits are thus unavailable for us to conduct de novo review. "In a law action the district court's findings of fact are binding upon us if those facts are supported by substantial evidence. Evidence is substantial if reasonable minds could accept it as adequate to reach the same findings." *Id.* (internal citations omitted).

As a prerequisite to obtaining relief under chapter 236, Labs had the burden of establishing by a preponderance of the evidence that Karteus engaged in "domestic abuse." *See* Iowa Code § 236.5 (providing that relief is available "[u]pon a finding that the defendant has engaged in domestic abuse"); *Wilker v. Wilker*, 630 N.W.2d 590, 596 (Iowa 2001) (stating that the burden of proof is a preponderance of the evidence). To establish "domestic abuse," Labs had to establish (1) that she and Karteus were in a domestic relationship within the meaning of Iowa Code section 236.2(2) and (2) that Karteus committed an assault against her within the meaning of Iowa Code section 708.1. Assault is a specific intent crime. *See State v. Bedard*, 668 N.W.2d 598, 601 (Iowa 2003). Therefore, as relevant here, Labs was also required to establish that Karteus intended to place her in fear of immediate physical contact, which will be painful, injurious, insulting, or offensive. *See id.*; Iowa Code § 236.2(2).

Karteus contends that the evidence is not sufficient to support a finding that he committed an assault within the meaning of Iowa Code section 708.1. On substantial evidence review, we construe the trial court's findings broadly and liberally. *See Tindell v. Apple Lines, Inc.*, 478 N.W.2d 428, 430 (Iowa Ct. App. 1991). The district court found as follows:

> Respondent committed a domestic abuse assault against the protected party named above. Specifically, the court finds that on March 3, 2013, Jay Karteus committed an act intended to place Amy Labs in fear of immediate physical contact which would be painful, injurious, insulting, or offensive, coupled with an apparent ability to execute the act. Based on the parties' prior history, Jay Karteus's conduct of waving his arms in close proximity to Amy Labs reasonably placed her in fear that Jay Karteus would strike her. The preponderance of the evidence supports the conclusion that Jay Karteus intended to place Amy Labs in fear of her physical safety.

We conclude that there is not substantial evidence that Karteus committed domestic abuse assault.

First, there is insufficient evidence that Karteus acted with the specific intent to place Labs in fear of physical contact. In an assault allegation, the focus "is on the offender's intent, not the victim's expectations." *Bacon*, 567 N.W.2d at 418. Whether the victim was afraid is not dispositive; "the focus of the assault statute is on the defendant, not the victim." *State v. Keeton*, 710 N.W.2d 531, 535 (Iowa 2006). There is no direct evidence of intent. Labs testified that Karteus threatened her, but the threat was to remain on the public portion on the road and wait for his son to come out. Karteus never made any direct or indirect threat of physical contact.

Labs argues that the parties' history is sufficient circumstantial evidence of Karteus's intent. While is true that a "history of threatening or violent conduct

involving the same victim can be especially probative" of intent, *see State v. Taylor*, 689 N.W.2d 116, 125 (Iowa 2004), the evidence here is still insufficient to support a finding that Karteus committed domestic abuse assault. The district court took judicial notice of a past finding of "abuse" when there was no such prior finding. It is thus unclear whether the Karteus's past conduct has any probative value here. There is also no evidence that the physicality occurring during the marriage continued beyond the parties' marriage. Thus, the finding of past physicality is remote in time and has diminished probative value.

Second, there is no overt act or conduct from which it could be inferred—regardless of the parties' history—that Karteus intended to make Labs fear immediate painful, injurious, insulting, or offensive physical contact. *See Keeton*, 710 N.W.2d at 534-35; *Owens v. Owens*, No. 08-1374, 2009 WL 606590, at *3 (Iowa Ct. App. Mar. 11, 2009) (vacating protective order where there was past domestic abuse but no present conduct sufficient to support a finding of assault). Karteus arrived at Labs house unannounced. They spoke to each other through the truck window. There is no evidence that Karteus ever exited or threatened to exit his vehicle during their discussion. In her appeal brief, Labs characterizes Karteus as "waiving his fists" at her. This characterization of the facts misstates the record. Labs' testimony was that "he started to wave his hands." There is no evidence that Karteus's hands broke the plane of the door separating him and Labs or that his gestures were directed at Labs as opposed to just gesticulating while speaking. There is no testimony that Karteus made any specific motion or action that reasonably could be interpreted as a threat of physical contact.

Labs' testimony that Karteus's conduct placed her in fear, standing alone and absent evidence sufficient to support a finding of domestic abuse assault, does not give rise to claim under chapter 236. Nothing in our opinion should be construed to condone Karteus's conduct. His conduct may be boorish, contumacious, or otherwise unlawful, but it does not rise to the level of domestic abuse assault. We therefore reverse the decision of the district court and vacate the protective order.

REVERSED.

Vogel, P.J., concurs; Mullins, J., concurs specially.

MULLINS, J. (concurring specially)

I respectfully write separately to bring attention to the issue of the appropriate standard of review. I would find that this case should have been reviewed de novo.

In the present case, Labs, the petitioner, was represented by counsel. Karteus, the respondent, was self-represented. Most of the objections that were made during the course of the trial were those made by counsel for Labs. Most of those objections were relevance objections, seeking to keep the evidence presentation on the issues of the domestic abuse petition and seeking to avoid the self-represented Karteus from straying from the issues to be tried as he attempted to raise decree modification issues or previously resolved divorce issues. The judge was actively involved in several dialogues with Karteus in trying to help him understand the scope of the proceedings, and the judge's personal examination of Karteus is shown in more than eight pages of transcript. Karteus was never put under oath or simply given an opportunity to make an uninterrupted narrative of the facts he wished to assert. Counsel for Labs was never given an opportunity to cross-examine Karteus. The judge took over the presentation of the evidence in this case in what was much more akin to an equitable proceeding than an at-law proceeding.

The majority has chosen to review this case at law despite the fact that domestic abuse cases are normally reviewed de novo. *See Wilker v. Wilker*, 630 N.W.2d 590, 594 (Iowa 2001) ("Civil domestic abuse cases are . . . heard in equity and, thus, deserve a de novo review."). I agree that our supreme court

has consistently held that the standard of review depends on the mode of trial in the district court. *Buda v. Fulton*, 157 N.W.2d 336, 338 (Iowa 1968) ("[A]s a case is heard in the trial court it is generally so considered on appeal."). Ruling on objections at the time they are made in the course of trial has often been a determinative factor in deciding the case should be reviewed at law even though the case could have or perhaps even should have been tried in equity. *Passehl Estate v. Passehl*, 712 N.W.2d 408, 414 (Iowa 2006). However, while it is a determinative factor, it is not dispositive as to how the case was tried at the district court level. *Id*.

In *Sille v. Shaffer*, 297 N.W.2d 379, 380-81 (Iowa 1980), the supreme court concluded that the case would be reviewed de novo despite the fact that the district court ruled on objections during trial. The court stated:

> Upon a de novo review it would be impossible, where we disagree with a trial court's evidentiary ruling, to consider necessary evidence which would be absent from the record. We have no such problem in this case. We have carefully read the transcript and find few instances in which evidence was excluded from the record. In none of these situations do we disagree with the trial court's evidentiary ruling.

Sille, 297 N.W.2d at 381.

I have reviewed the transcript in this case and find few instances where the court excluded evidence from the record based on its evidentiary rulings, and such exclusions in this case do not impact my review of the facts and record of this case. The trial judge clearly sought to manage the courtroom during the trial of a case which involved a self-represented litigant and for which the judge was

under time constraints.[1] The court's rulings on those objections were clearly efforts at effective trial management involving a self-represented litigant who did not understand the scope of the proceedings. They were not rulings on objections that denied this appellate court an opportunity to review the admissibility of evidence such that the objects of a de novo review were somehow thwarted, with the possible exception of one exhibit offered by Karteus for which a foundation objection was sustained but which apparently was also of little relevance.

I also note it is Labs who claims the case was tried at law as the court ruled only on the relevancy objections her counsel raised during trial. One party should not have the power to "convert" a case from a de novo review to an at law case by repeatedly raising objections, obtaining rulings, then arguing in effect "ah-ha, the case is now at law."

Considering all the facts and circumstances in this case, I would conclude that the mode of trial was more akin to an equitable proceeding and that ruling on a few relevancy objections did not convert this case to one at law.

Accordingly, I respectfully concur specially.

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[1] The trial judge made at least three references to time limitations.